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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/838,809	04/20/2001	Grant E. DuBois	04286.00010	3526

22852 7590 03/05/2004

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EXAMINER

PADEN, CAROLYN A

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 03/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/838,809

Applicant(s)

DUBOIS ET AL.

Examiner

Carolyn A Paden

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 2-24-04.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-6,8-10,13,14,16,17,19-21,23-24,26-29,31-37,42-105 is/are rejected.
- 7) ☒ Claim(s) 39 and 40 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>10-10-03</u> | 6) <input type="checkbox"/> Other: _____ |

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 4, 5, 8, 9, 13, 14, 16, 17, 19-21, 23, 24, 26-29, 31-37, 42-90 rejected under 35 U.S.C. 102(e) as being anticipated by Broz (US 2002/0197376).

Broz discloses a beverage concentrate containing carbonated water, a polyol, flavor and a high intensity sweetener (see abstract). The beverage is designed to be utilized in a dispenser for slush beverages (page 1, paragraph 15 and 2). High intensity sweeteners are also disclosed. Erythritol and sorbitol are disclosed to have a desirable freezing point lowering effect (page 2, paragraph 17). The amount of freezing point depressant is selected so that the beverage can be processed in standard equipment (paragraphs 2 and 15). Thus it is the examiners position that all of the conditions of claim 13 are anticipated by the reference.

Claims 29, 39, 103-105 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 39 recites a ratio and it is unclear what component is associated with "1" and what component is associated with "3". An amendment to the claims clarifying this issue would overcome the rejection.

Applicant has included three new claims to the application, which add in a scientific inaccuracy that was previously corrected in the independent claims. It is requested that applicant cancel these claims. The calories in the composition are not altered because applicant has moved them to claims 103-105.

It is unclear in claim 29 as to what is combined. An amendment to the claims clarifying this issue would overcome the rejection.

Claims 1, 4, 5, 8, 9, 21, 29, 32-36, 44-47, 51, 53, 64-67, 69, 71, 73, 76, are rejected under 35 U.S.C. 102(e) as being anticipated by Stefandl (2002/0136803).

Upon further consideration, examiner is reinstituting Stefandl as prior art against the claims.

Stefandl discloses a freezer altering additive composition for use with commercial beverages. The composition is made from a 1).carbohydrate, 2)glycerol or propylene glycol and 3)a sugar alcohol such as sorbitol and erythritol (claim 1). The beverages are ready-to-drink compositions such as cola and cream soda (paragraph 33). Artificial sweeteners are also contemplated in the product. The freeze altering composition is simply added to the bottle and the bottle is tossed into the freezer (note sample D at paragraph 53). Although not specifically stated, cola and cream soda are well known in the art to be carbonated beverages. The dispenser, in this case, is the bottle in the freezer.

Claims 1, 2, 5, 6, 9, 10, 44-46, 104-105 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich (3,826,829) in view of Cole (4,452,824) and deCock (6066345) taken together.

Marulick discloses a slush beverage that is carbonated and is formed with water, sugars, polyols, flavor and coloring agents (see abstract). At column 3, lines 52-62, the concept of using polyhydric alcohols, such as glycerol, sorbitol and propylene glycol and combinations thereof is indicated. These polyhydric alcohols are termed "freezing point depressant material" at column 2, lines 52-55. Carbonation of the beverage is

additionally shown at column 4, lines 1-4. Claims 1 and 5, as an examples, appear to differ from the reference in the suggestion of the specific polyhydric alcohol that is set forth in the claims. Cole teaches that saccharides and sugar alcohols are well known to depress the freezing point of edible formulations (column 2, lines 14-34). DeCock is relied upon to show that erythritol is a sugar alcohol that is used in foods and beverages (column 1, lines 21-35). Thus with the references before him, one of ordinary skill in the food and beverage art would have recognized that the polyhydric alcohols of Marulick included the sugar alcohols of Cole and the erythritol of deCock as a suggested freezing point depressant. Claims 2 and 6 appear to differ in the selection of different sugar mns as freezing point depressant. But given the broad disclosure of deCock to saccharides, one of ordinary skill in the art would have expected that fructo-oligosaccharide to be included as a saccharide.

Claims 4,5,21,24,26-29,32-36,47-52,64-81 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulick in view of deCock and Cole taken together as applied to claims 1, 2, 5, 6, 9, 10, 44-46, 104-105 above, and further in view of Beyts (580,541).

The claims appear to differ from the reference in the inclusion of a non-caloric sweetener in the composition. Beyts discloses that it is well known in the art to combine sucralose with a sweet saccharide, such as a sugar alcohol as well as other sweetening agents to provide a synergistic sweetening composition. Thus it would have been obvious at the time of the invention to include a non-caloric sweetener in the composition of Marulick in order to enhance the sweetness of the product.

Claims 91-102 rejected under 35 U.S.C. 103(a) as being unpatentable over Marulick in view of deCock and Cole taken together as applied to claims 1, 2, 5, 6, 9, 10, 44-46, 104-105 above, and further in view of Anderson (6,432,464).

The claims appear to differ from Marulick in the use of tagatose. Anderson discloses that tagatose is a well-known non-caloric sweetener that can be used in beverages and also has synergistic sweetening when combined with other non-caloric sweeteners. It would have been obvious at the time of applicants' invention to utilize tagatose as a non-caloric sweetener in the composition of Marulick in order to provide sufficient sweetness to the product without adding a lot of calories.

Claims 39 and 40 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on

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access to the Private PAIR system, contact the Electronic Business Center
(EBC) at 866-217-9197 (toll-free).

Carolyn Paden
CAROLYN PADEN 3-1-04
PRIMARY EXAMINER
GROUP 1800 // 761